HUAT SIANG HARDWARE SDN BHD v. AMIR FAEZAL NORZELA & CHONG

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[CIVIL APPEAL NO: BA-12BNCVC-49-12-2022]
9 FEBRUARY 2024

Abstract – *In a sale and purchase of a land transaction, where the vendors utilised a power of attorney ('POA') to execute the sale and purchase agreement and memorandum of transfer, there is a duty on the part of the solicitors acting on behalf of the purchaser to ensure that the said POA has been duly registered not only with the High Court, but also with the relevant land office/registry. Failure to ensure such would cause the solicitors to breach its duty of care towards its client or the purchaser.*

LEGAL PROFESSION: *Duty to client – Conveyancing – Sale and purchase of land – Solicitors appointed by purchaser to represent them in purchase of land – One of vendors signed sale and purchase agreement ('SPA') and memorandum of transfer ('MOT') on behalf of other vendors through power of attorney ('POA') – POA duly registered with High Court but not with relevant land office/registry – MOT subsequently could not be executed – Whether failure on part of solicitors to ensure POA had been registered with relevant land office/registry prior to execution of SPA and MOT and release of cheque for balance deposit to vendors' solicitors tantamount to breach of solicitors' duty towards client*

This was an appeal from the Sessions Court. The appellant was a company, while the respondent was a legal firm. In 2018, the appellant appointed the respondent as their conveyancing solicitor for the purchase of a parcel of freehold land ('land') at the purchase price of RM6,600,000. The land was registered under the name of four individuals, one of which was 'Mohd Rohim Maskor' ('Rohim') ('vendors'). Pursuant to the respondent's advice, that the vendors' solicitors were one 'Messrs Malek & Associates' ('vendors' solicitors'), the appellant executed a sale and purchase agreement ('SPA') and a memorandum of transfer ('MOT'), which were prepared by the respondent, with the vendors. On the vendors' part, the SPA and MOT were executed by Rohim for himself and as attorney on behalf of other vendors purportedly pursuant to a power of attorney ('POA'). The POA was duly registered at the Shah Alam High Court, but it was never registered at the relevant land office notwithstanding that the registration of the same at the relevant land office was mandatory under s. 310 of the National Land Code. However, the respondent still advised the appellant to make the necessary payments to the vendors' solicitors, in the amounts of RM132,000 and RM528,000, respectively, for the earnest and balance deposits. The payments made to the vendors' solicitors totalled to RM660,000, being the 10% of the purchase

price of the land. Subsequently, the respondent discovered that the MOT could not be executed due to its non-registration at the relevant land office. Hence, the respondent advised the appellant to 're-execute' the SPA together with the MOT while being witnessed by one officer of the relevant land office, but now, with the vendors on their personal capacity, by discarding the POA. A new page was then re-executed by the appellant. And the existing signing page from the SPA (which was executed under the POA) was removed and replaced with the newly signed page. All the terms and conditions of the original SPA was maintained. Nevertheless, sometime in 2019, the respondent suspected that there was fraud regarding the land transaction. Based on the appellant's instruction, the respondent then demanded the vendors' solicitors to return the deposit paid together with the liquidated damages pursuant to the terms of the SPA. The respondent also demanded the vendors' solicitors to transfer the file regarding the land transaction to another legal firm. Prior to the said transfer, the respondent had already demanded payment of the sum of RM13,000 from the appellant, being the legal fee for the conduct of the land transaction, to which the appellant paid in protest. At the Sessions Court, the appellant claimed that it had suffered losses in the amount of RM673,000 due to the land transaction. The appellant also initiated a suit against the respondent based on professional negligence, misrepresentation and breach of the terms of appointment for the sum of RM673,000 ('suit'). The Sessions Court Judge ('SJ'), after considering that the respondent had conducted a land search, bankruptcy searches and having letters of authorisation signed by the vendors in their conduct in this land transaction, held that the appellant had failed to establish negligence on the part of the respondent. The suit was then dismissed by the SJ. Aggrieved, the appellant filed the present appeal. The main issue that arose was whether the respondent had failed to discharge its duty of care by failing to ensure that the POA had been deposited with the relevant land office prior to the execution of the SPA and MOT and the release of the balance deposit to the vendors' solicitors.

Held (allowing appeal):

(1) The respondent failed to ensure that the POA had been deposited with the relevant land office before the execution of the SPA by the appellant and the release of the cheque to the vendors' solicitors. The respondent ought to be aware that the POA must be deposited with the relevant land office, for otherwise the MOT would not be able to be registered. It would be prudent for a solicitor to ensure that the POA had first been deposited with the relevant land office before advising his/her client to execute the SPA and pay the deposit. Depositing the POA with the land office was a quick and simple process of filing the POA with the requisite fees. It would not be unreasonable to expect solicitors acting for a purchaser to insist that this be done before the execution of the SPA and payment of the deposit. (paras 30 & 31)

(2) The facts in this case demonstrated the importance of having a POA duly deposited with the land office prior to the execution of the SPA and the MOT. This was because the land office in appropriate circumstances, would be able to detect impropriety, raise the necessary alert and avert fraudulent transactions. Had the respondent insisted on the deposit of the POA with the land office, the respondent would had been aware of the rejection by the land office of the deposit of the POA. The respondent acting reasonably with the alert would be expected to find out the reasons for the rejections, instead of just agreeing to the re-execution of the SPA and the MOT. Re-executing the SPA by just swapping the signing page without fresh dating the SPA should not be a condoned practice. Having been alerted of the issue of the POA, on receipt on the MOT purportedly executed by the vendors, it would be prudent practice for the respondent to verify the execution with the person who purportedly attested the execution. If this had been done, the fraud would have been discovered and the appellant would not have paid the balance deposit. (paras 32 & 35)

(3) The decision of the Sessions Court was set aside. The appellant's claim was allowed for the amount of RM528,000 with the respondent ordered to pay the appellant the costs of RM20,000 subject to allocatur. (paras 36-38)

Legislation referred to:
National Land Code, s. 310

For the appellant - Tee Kuo Ying; M/s Hisham Yoong – KC Lim
For the respondent - Tan Keng Teck & Goh Gin Jhen; M/s Lim Kian Leong & Co

Reported by Syamim Ariffin

JUDGMENT

Choong Yeow Choy JC:

Introduction

[1] Vendors and purchasers of properties place their total trust on the expertise, advice and acts of their conveyancing lawyers to help them complete the tasks of property conveyancing transactions that they are involved in. In this regard, the significance of a conveyancing lawyer's role and responsibilities cannot be overstated. The duties and functions undertaken and discharged by those responsible in such property conveying transactions are indeed onerous.

[2] The present suit/appeal before this court underscores the above observations and put the spotlight on the professional duties expected of conveyancing lawyers in this country.

A **The Issues In The Present Suit/Appeal**

[3] The overriding issue in the present appeal is whether the learned Sessions Court Judge was correct in dismissing the appellant's suit initiated against the respondent based on professional negligence, misrepresentation and breach of the terms of appointment for the sum of RM673,000.

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[4] In determining this prevailing issue, this court will have to consider whether a case has been made out against the respondent for professional negligence, misrepresentation and breach of the terms of appointment on a balance of probabilities.

C **[5]** Foremost is the pivotal issue of whether the respondent had failed to exercise the standard of care expected of solicitors in the same matter.

The Parties, The Background Facts And The Suit In The Sessions Court

[6] The appellant in the present appeal, Huat Siang Hardware Sdn Bhd, was the plaintiff in the Sessions Court.

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[7] On the other hand, the respondent in the present appeal, Amir Faezal Norzela & Chong, a legal firm, was the defendant in the Sessions Court.

[8] On or around June 2018, the appellant had appointed the respondent to represent them as its solicitors for the purchase of a parcel of freehold land at the purchase price of RM6,600,000.

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[9] The land in question is registered in the names of four individuals, namely, Mohd Rohim bin Maskor, Ismail @ Haji Ismail bin Maskor, Siti Rahmah binti Maskor and Zaiman @ Zainab binti Maskor.

F **[10]** The respondent had advised the appellant that Messrs Malek & Associates was the vendors' solicitors.

[11] On 30 July 2018, in reliance on the respondent's advice, the appellant executed a sale and purchase agreement (the terms of which were drafted by the respondent) and the memorandum of transfer (that was prepared by the respondent).

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[12] On the vendors' part, this sale and purchase agreement and memorandum of transfer was executed by Mohd Rohim bin Maskor for himself and as attorney for Ismail @ Haji Ismail bin Maskor, Siti Rahmah binti Maskor and Zaiman @ Zainab binti Maskor purportedly pursuant to a power of attorney dated 25 June 2018.

H

[13] Although the power of attorney was duly registered at the Shah Alam High Court on 25 June 2018 *vide* Presentation No. PA10480/18, it was not registered at the relevant land office notwithstanding that registration of the power of attorney at the land office is mandatory under s. 310 of the National Land Code.

I

[14] In reliance on the respondent's advice as the appellant's solicitors, the appellant made the following payments to Messrs Malek & Associates, namely:

(i) the sum of RM132,000 *vide* a cheque dated 22 June 2018 being the earnest deposit prior to the execution of the sale and purchase agreement; and

(ii) the sum of RM528,000 *vide* a cheque dated 11 July 2018 being the balance deposit upon execution of the said sale and purchase agreement. PA.

Therefore, the total amount paid by the appellant to Messrs Malek & Associates was RM660,000, being 10% of the purchase price of the land in question.

[15] In or around February 2019, the respondent informed the appellant that the memorandum of transfer cannot be executed due to the non-registration of the power of attorney at the relevant land office. In order to resolve the matter, the respondent advised the appellant to "re-execute" the sale and purchase agreement and the memorandum of transfer with the vendors/landowners in their personal capacity, discarding the power of attorney.

[16] On 13 March 2019, in reliance on the respondent's advice and instructions, the appellant re-executed a new signing page. Thereafter, the respondent removed the existing signing page from the original sale and purchase agreement (which was executed under the power of attorney) and replaced it with the newly executed signing page keeping all other terms and conditions therein the same.

[17] The appellant was also required to sign a new memorandum of transfer for the vendors/land owners' execution in their personal capacity. The signing of this new memorandum of transfer was purportedly witnessed by one Siti Narida binti Mohd Nor, Penolong Pentadbir Tanah, Pejabat Daerah Tanah Klang.

[18] Sometime in April 2019, the respondent informed the appellant that the respondent suspected fraud in the land transaction.

[19] The appellant then instructed the respondent to demand the return of the deposit paid to Messrs Malek & Associates together with liquidated damages pursuant to the terms of the sale and purchase agreement. The appellant also instructed the respondent to transfer the file to another firm of solicitors, Messrs Hisham Yoong – KC Lim.

[20] Prior to the said transfer, the respondent demanded payment of the sum of RM13,000 being the respondent's legal fee for conduct of the land transaction, which the appellant paid under protest.

[21] The appellant claimed that it had thus suffered losses amounting to RM673,000 in the above land transaction.

[22] The particulars of the claim by the appellant against the respondent before the Sessions Court, for negligent and misrepresentation, are as follows:

(i) the respondent had failed to ascertain the credibility and/or trustworthiness of the vendors' solicitors;

(ii) the respondent had failed to discover that the vendors' solicitors did not have a valid practising certificate;

(iii) the respondent had failed to detect signatures on the letter of authorisation was different from the signatures on the power of attorney and that the power of attorney was not registered with the land office; and

(iv) the respondent had failed to obtain a copy of the title to the property or certified copies of the vendors' NRICs.

In addition, the appellant also alleged breach of the terms of appointment by the respondent.

[23] The respondent's defences are, *inter alia*, as follows:

(i) the appellant had failed to establish a case for professional negligence, misrepresentation and breach of terms of appointment;

(ii) the appellant's primary witness (SP1) had admitted under oath that it was the vendors' solicitors, and not the respondent, that caused the loss;

(iii) if a finding of negligence was made against the respondent (which the respondent denied), the actions of the appellant/purchaser (by expediting on a "bargain deal" and then pleading ignorance) and its solicitors had broken the chain of causation (*novus actus interveniens*);

(iv) the appellant ought to have pursued and exhausted all legal remedies against the vendors' solicitors to recover its loss; and

(v) it was on the respondent's good advice and due diligence that prevented the appellant from releasing the partial balance purchase price of RM4.5 million to the vendors' solicitors.

The Decision Of The Sessions Court

[24] The reasonings of the learned Sessions Court Judge for dismissing the claim by the appellant against the respondent can be gleaned from paras. [25] to [40] of her grounds of judgment. The learned Sessions Court Judge explained as follows:

[25] Dalam kes di hadapan Mahkamah ini, Defendan yang merupakan seorang peguam bela dan peguam cara mempunyai kewajipan berjaga-jaga semasa mengendalikan urusan PJB Tanah kerana Plaintif telah melantik Defendan bagi maksud itu.

[26] Plaintif menyatakan bahawa Defendan telah melakukan suatu kecuaian profesional dalam pengendalian PJB tersebut.

[27] Memandangkan Defendan merupakan seorang peguam bela dan peguam cara, maka, Plaintif hendaklah membuktikan kehendak elemen standard berjaga-jaga bagi membuktikan sama ada seseorang peguam itu telah melakukan suatu kecuaian profesional.

[28] Merupakan suatu undang-undang yang mantap bahawa untuk membuktikan kecuaian profesional terhadap seseorang peguam bela dan peguam cara, elemen standard berjaga-jaga yang berikut hendaklah dibuktikan terlebih dahulu:

(a) sama ada Defendan mempunyai kewajipan berjagajaga terhadap Plaintif;

(b) apakah standard jagaan profesional yang diharapkan daripada seseorang peguam yang cukup kompeten semasa mengendalikan transaksi Jual Beli;

(c) sama ada terdapat apa-apa pelanggaran standard jagaan profesional;

(d) sama ada Plaintif telah mengalami apa-apa kerugian akibat daripada pelanggaran langsung standard jagaan profesional itu;

[29] Oleh yang demikian, bagi kes di hadapan Mahkamah ini, memandangkan Defendan merupakan seorang peguam bela dan peguam cara, Plaintif hendaklah membuktikan elemen standard sebagaimana yang dinyatakan dalam perenggan 28.

[30] Mahkamah mendapati bahawa Defendan sebagai seorang peguam bela dan peguam cara telah, dengan cukup kompeten menjalankan transaksi PJB dengan cukup berhati-hati dengan kewajipan berjaga-jaga.

[31] Hal perkara ini dapat dilihat melalui Pembelaan Defendan yang telah menerangkan tentang standard jagaan yang telah dilakukan oleh Defendan.

[32] Malah, saksi utama Plaintif iaitu Sim Ann Huat ["SP1"], semasa pemeriksaan balas telah mengaku bahawa carian yang dilakukan oleh Defendan sememangnya melindungi kepentingan Plaintif sebelum pembayaran Earnest Deposit:

PD Mr. Sim, I just took you through many documents, based on all the documents shown to you, do you agree that before this 22.6.2018 your lawyer the Defendant had conducted a land search, bankruptcy searches, I showed you the letter of authorisation signed by the 4 land owners and also the Malaysian Bar Website search. Do you agree?

SPI I agree.

PD Mr. Sim, do you agree that all of these searches, authorisation, verifications done by your lawyer Miss Sim were done to protect the Plaintiff before the earnest deposit was paid. Agree?

SPI Agree.

PD I therefore put it to you' Mr. Sim that the Defendant had taken reasonable and prudent step to protect the Plaintiff's position before the earnest deposit was paid to Malek & Associates. Agree?

SP1 Yes.

[33] Malah, saksi pakar Plaintif iaitu Mahendran Shanmuhan Sundaram, ["SP2"] juga telah mengaku semasa pemeriksaan balas bahawa Earnest Deposit yang dilepaskan adalah munasabah dalam hal keadaan sedemikian yakni carian telah dilakukan oleh Defendan walaupun dalam tempoh yang singkat iaitu 9 hari.

[34] Dengan pengakuan SP1 dan SP2 itu, maka, adalah fakta yang tidak dipertikaikan bahawa sememangnya Defendan telah melakukan transaksi PJB dengan cukup kompeten dan penuh berhati-hati.

[35] Adakah Plaintif berjaya membuktikan kecuaian profesional terhadap Defendan?

[36] Mengikut kes *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 1 MLJ 486:

> .... beban adalah ke atas Plaintif untuk membuktikan standard berhati-hati telah dimungkiri sebelum Defendan dikehendaki untuk memanggil saksinya untuk mematahkannya.

[37] Mahkamah mendapati bahawa Plaintif gagal membuktikan standard berhati-hati yang dimungkiri oleh Defendan.

[38] Dalam erti kata lain, Plaintif telah gagal membuktikan kecuaian profesional terhadap Defendan yang, lantaran itu, tiada apa-apa kerugian dialami oleh Plaintif.

[39] Dalam apa jua keadaan, Mahkamah berpendapat bahawa Defendan telah bertindak mengikut standard pengamal undang-undang yang profesional dan secara munasabah ketika mengendalikan transaksi Jual Beli, dan dalam nasihat Defendan kepada Plaintif tentang pelepasan Earnest Deposit kepada Tetuan M & A.

[40] Mahkamah juga berpendapat bahawa bukan merupakan suatu kecuaian mahupun salahnyataan di pihak Defendan semasa transaksi Jual Beli itu dikendalikan sehingga menyebabkan Plaintif mengalami kerugian sebagaimana didakwa, TETAPI, salah laku oleh Tetuan M & A yang menjadi penyebab utama Plaintif mengalami kerugian.

[25] The learned Sessions Court Judge was satisfied that the appellant had failed to establish negligence on the part of the respondent. The learned Sessions Court Judge was influenced by the fact that the respondent had conducted a land search, bankruptcy searches and having letters of authorisation signed by the four landowners/vendors in their conduct of this conveyancing transaction.

The Decision Of This Court

[26] This court is of the considered view that the facts suggesting that the appellant had "instructed" and "directed" the respondent "to secure the property as soon as possible" and for "the transaction to be completed on an urgent basis" do not absolve the respondent of the duty owed to the appellant. Nor is the fact that the sale of this land was at a bargain price. These facts have no bearing on the outcome of the central issue under consideration.

[27] On the crucial issue of whether the respondent had failed to exercise the standard of care expected of solicitors in the same matter, foremost in the mind of this court is the following question, that is, having been made aware of the intended execution of the sale and purchase agreement using a power of attorney, would an attending solicitor be said to have failed to discharge his/her duty of care if the solicitor fails to ensure that the power of attorney be deposited with the relevant land office prior to advising his/her client to execute the sale and purchase agreement, memorandum of transfer and to release the balance deposit to the vendor's solicitors?

[28] In matters involving sale and purchase agreements over immovable property, where a person claiming to be the attorney for the vendor(s) utilises a power of attorney to execute the sale and purchase agreement, solicitors engaged to attend to the transaction will be expected to, *inter alia*:

(i) scrutinise the contents of the power of attorney to ensure that the powers conferred therein include the powers of sale, disposal, execution of all related documents and receipts of proceeds in relation to the subject immovable property;

(ii) ensure that the power of attorney has been validly executed in accordance with the Powers of Attorney Act 1949 and duly registered with the High Court;

(iii) (where the immoveable property has been issued with a separate document of title), ensure that the power of attorney has been deposited with the relevant land office/land registry pursuant to the National Land Code; and

(iv) ensure that the power of attorney is still valid, subsisting and has not been revoked.

[29] As for (iii) above, it is the usual practice for conveyancing lawyers:

(i) to sight a certified true copy of the power of attorney (as certified by the High Court);

(ii) to sight a certified true copy of the identity cards of the attorney and of the donor;

(iii) to state expressly in the sale and purchase agreement the particulars of the power of attorney, including the particulars of the registration with the High Court and the particulars of the deposit of the power of attorney with the land office. These particulars can be found endorsed on the copy of the power of attorney sighted by the solicitors.

[30] In the present case, the respondent firm failed to ensure that the power of attorney has been deposited with the relevant land registry/land office before execution of the sale and purchase agreement by the purchaser/appellant and release of the cheque to Messrs Malek & Associates. The respondent ought to be aware that the power of attorney must be deposited with the relevant land registry/land office, for otherwise the memorandum of transfer cannot be registered.

[31] It would be prudent for a solicitor to ensure that the power of attorney is first deposited with the relevant land registry/land office before advising his/her client to execute the sale and purchase and pay the deposit. Depositing the power of attorney with the land registry/land office is a quick and simple process of filing the power of attorney with the requisite fees. It will not be unreasonable to expect solicitors acting for a purchaser to insist that this be done before the execution of the sale and purchase agreement and payment of the deposit.

[32] The facts in this case demonstrate the importance of having a power of attorney duly deposited with the land office prior to the execution of the sale and purchase agreement and the memorandum of transfer. This is because the land office would in appropriate circumstances be able to detect impropriety, raise the necessary alert and avert fraudulent transactions.

[33] Had the respondent insisted on the deposit of the power of attorney with the land office, the respondent would be made aware of the rejection by the land office of the deposit of the power of attorney. The respondent acting reasonably with the alert would be expected to find out the reasons for the rejection, instead of just agreeing to the re-execution of the sale and purchase agreement and the memorandum of transfer. Re-executing the SPA by just swapping the signing page without fresh dating the sale and purchase agreement should not be a practice to be condoned. Having been alerted of the issue over the power of attorney, on receipt of the memorandum of transfer purportedly executed by the four registered proprietors personally, it would be prudent practice for the respondent to verify the execution with

the person who purportedly attested the execution. If this had been done, the fraud would have been discovered and the appellant would not have paid the balance deposit of RM528,000.

[34] The preparation, execution, verification and lodgement of numerous legal documents are important elements of conveyancing. These duties extent beyond the conducting of land and bankruptcy searches.

[35] However, as for the earnest deposit of RM132,000 which was paid prior to the respondent being informed of the intended use of the power of attorney, it cannot be said that the respondent had been negligent.

[36] The decision of the Sessions Court is hereby set aside.

[37] The appellant's claim is allowed, for the amount of RM528,000.

[38] The respondent to pay the appellant costs of RM20,000, subject to allocatur.